

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Rules and Policies on Foreign Participation)
in the U.S. Telecommunications Market)

IB Docket No. 97-142

COMMENTS OF
NYNEX LONG DISTANCE COMPANY

NYNEX Long Distance Company ("NYNEX LD")¹ hereby provides limited comments in response to the Federal Communications Commission ("FCC" or "Commission") Notice of Proposed Rulemaking ("NPRM")² on Foreign Participation in the U.S. Telecommunications market following adoption of the World Trade Organization ("WTO") Group on Basic Telecommunications ("GBT") agreement ("WTO Agreement").³ NYNEX LD supports the NPRM's objective to develop open international telecommunications markets as envisioned by the WTO Agreement. NYNEX LD requests clarification of an apparent ambiguity in the *NPRM* regarding the Commission's proposal to limit its "no special concessions" rule to

¹ NYNEX LD is a wholly-owned subsidiary of NYNEX, established for the purpose of providing domestic and international long-distance services. As an emerging, competitive long distance provider, NYNEX LD has a keen interest in the development of long distance competition in both the domestic and international markets.

² *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, Order and Notice of Proposed Rulemaking, FCC 97-195 (June 4, 1997) [hereinafter "*NPRM*"].

³ World Trade Organization Group on Basic Telecommunications, *Fourth Protocol to the General Agreement on Trade in Services* (February 15, 1997) [hereinafter "*WTO Agreement*"].

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carriers deemed to have "market power" in a foreign market and the potential impact of that proposal on the competitive safeguards recently adopted in the Commission's accounting rates *Flexibility Order*.⁴

The *NPRM* makes plain that the Commission did not intend to alter the competitive safeguards adopted in the *Flexibility Order*.⁵ Under those rules, carriers that enter into alternative arrangements involving 25 percent or more of the traffic on a particular route must publicly file the arrangements and bear the burden of demonstrating that the agreement does not contain unreasonably discriminatory terms and conditions.⁶ NYNEX LD strongly supports maintenance of this competitive safeguard in order to ensure that carriers with significant traffic share do not engage in anticompetitive conduct.⁷ Indeed, NYNEX LD has urged the FCC to clarify that its competitive safeguards prohibit the inclusion of exclusive terms in alternative settlement arrangements affecting 25 percent or more of the traffic on a route unless the carrier can show that the terms of the agreement are not unreasonably discriminatory.⁸

⁴ See *Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, Fourth Report and Order, FCC 96-459 (Dec. 3, 1996) ("*Flexibility Order*"), recon. pending.

⁵ *NPRM*, ¶ 145 n.139.

⁶ *Flexibility Order*, ¶¶ 36, 45. The international settlements policy, or ISP, otherwise requires: (1) the equal division of accounting rates; (2) nondiscriminatory treatment of U.S. carriers; and (3) proportionate return of inbound traffic.

⁷ As the Commission noted in the *Flexibility Order*, concern exists that a carrier with a significant share of the traffic could "extract anti-competitive special concessions from foreign carriers to the detriment of other U.S. carriers." *Flexibility Order*, ¶ 44.

⁸ See *Petition for Clarification of NYNEX LD*, CC Docket No. 90-337, at 4 (March 10, 1997). The prohibition would apply to alternative settlement arrangements that include provisions that are either *de jure* or *de facto* exclusive in nature.

At the same time, the *NPRM* proposes significant liberalization of the ability of U.S. international carriers to enter into alternative settlement arrangements with foreign correspondents that deviate from the Commission's international settlements policy. Specifically, the agency would expand its rebuttable presumption that alternative arrangements are permitted on routes involving carriers from WTO Member countries.⁹ NYNEX LD supports this proposal and believes that it can further stimulate the development of a truly competitive environment in international telecommunications.

Despite the Commission's clear support for the competitive safeguards adopted in the *Flexibility Order*, NYNEX LD is concerned that a separate proposal in the *NPRM* could be misinterpreted unintentionally to compromise certain aspects of those safeguards. Specifically, the Commission proposed in the *NPRM* to amend its "no special concessions" rule¹⁰ so that it applies solely to concessions granted by foreign carriers that have "market power."¹¹ This proposal may conflict with the *Flexibility Order's* competitive safeguards because the *Flexibility Order's* safeguards prohibit unreasonably discriminatory alternative settlement agreements – including those with exclusive terms – based on the proportion of international traffic that a carrier handles, rather than on whether a carrier has market power in a foreign country.

⁹ *NPRM*, ¶ 150 (proposing to permit carriers from all WTO Member countries to enter into alternative settlement arrangements under the *Flexibility Order*). The *Flexibility Order* adopted rules permitting the use of alternative settlement arrangements on routes involving countries that had satisfied the Commission's effective competitive opportunities test ("ECO test").

¹⁰ The Commission's special concessions rule prohibits arrangements that are offered exclusively by a foreign carrier to a particular U.S. carrier and not to other U.S. carriers similarly situated. See 47 C.F.R. § 63.14. The *Flexibility Order* allows carriers to depart from the requirements of Section 63.14, subject to the competitive safeguards adopted in the *Flexibility* proceeding.

¹¹ *NPRM*, ¶ 115.

The potential for conflict can be illustrated by focusing on a hypothetical foreign-affiliated international long distance carrier that handles more than 25 percent of the traffic on certain routes but whose foreign affiliates do not have market power in the destination countries. On the one hand, the *Flexibility Order's* competitive safeguards would clearly apply to the carrier: it would be required to file copies of alternative settlement arrangements and demonstrate that the agreements do not contain unreasonably discriminatory terms. On the other hand, however, the hypothetical carrier may be in a position to argue that the Commission's prohibition on unreasonably discriminatory terms does not bar the use of exclusive terms and provisions since the Commission's "no special concessions" rule, as tentatively amended in this proceeding, applies only to carriers that have market power in a destination country.

The remedy for this potential conflict is simple. NYNEX LD requests that the Commission include language in any Order issued in this proceeding indicating that its modification of the special concessions rule applies "except as otherwise provided in the Commission's rules regarding alternative settlement arrangements." Conditional language such as this would preserve the concepts underlying the *Flexibility Order's* competitive safeguards. Such an approach also would be consistent with the Commission's policy objectives in the *NPRM*.

In sum, the Commission clearly affirmed in the *NPRM* that it does not intend to alter the *Flexibility Order's* competitive safeguards. Some of the language in that *NPRM*, however, is ambiguous and could be misinterpreted to permit carriers – especially foreign-affiliated carriers – to enter into unreasonably discriminatory and exclusive arrangements that would not benefit U.S. consumers or carriers. Thus, NYNEX LD urges the Commission to eliminate any confusion by indicating in any amended "no special concessions" rule adopted in this proceeding that the

amendment does not alter the applicability of the rule to alternative settlement arrangements, as provided in the *Flexibility Order*'s competitive safeguards.

Respectfully submitted,

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